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In the Supreme Court of the United States

OCTOBER TERM, 1979

WATERBURY URBAN RENEWAL AGENCY, PETITIONER

v.

WATERBURY ACTION TO CONSERVE OUR HERITAGE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 603 F.2d 310. The opinion of the district court (Pet. App. 3b-19b) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1979. The petition for a writ of certiorari was filed on September 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, after it has approved an urban renewal plan authorizing demolition of the structure in question, the Department of Housing and Urban Development has a continuing duty to comply with Section 106 of the National Historic Preservation Act when, in the loan and grant contract, the Department retains the right to object to demolitions.

STATEMENT

In 1971, the City of Waterbury, Connecticut, adopted an urban renewal plan, known as the Central Business District Renewal Project No. Conn. R-107, which established plans for the rehabilitation of 20.6 acres in downtown Waterbury (Pet. App. 5a-6a). On May 11, 1973, the Department of Housing and Urban Development entered into an urban renewal loan and grant contract with petitioner for the purpose of implementing the central business district renewal plan.[1] Under the terms of the loan and grant contract HUD may object to acquisitions, demolitions and changes in the Waterbury renewal plan. The purpose of this right to object is to insure that petitioner does not take any step which might, in the opinion of HUD, violate applicable federal laws or

[1] The loan and grant contract provides that HUD will give petitioner $12,844,451 in loans and $11,544,451 in a grant to carry out the project (Pet. App. 5b). At present only $12,000,000 has been spent. The project is far from complete; as of November 1978, 27 buildings remain to be demolished and some of the land has yet to be acquired (Pet. App. 6a).

regulations or provisions of the contract (Pet. App. 7a-9a n.4).[2]

The regulations set forth in HUD's Environmental Handbook, 1390.1 *et seq.*, 38 Fed. Reg. 19182, 19188 (1973),[3] provided that HUD prepare an environmental assessment before it authorized the loan and grant contract. This assessment is a single review procedure to meet the requirements of both the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. 470 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*[4]

[2] Section 108(A) of the loan and grant contract requires petitioner to submit to HUD documentary data with respect to any of the above-cited actions that petitioner proposes to take in carrying out the project. The provision relating to HUD's right to object is set forth in Section 108(B) of the contract.

[3] HUD's Environmental Handbook has subsequently been amended at 39 Fed. Reg. 38922 (1974); 41 Fed. Reg. 23878 (1976); 42 Fed. Reg. 13208 (1977); 43 Fed. Reg. 797 (1978); 44 Fed. Reg. 12856 (1979).

[4] HUD's Handbook was also prepared in compliance with Exec. Order No. 11,593, 36 Fed. Reg. 8921 (1971), which mandated that federal agencies, in consultation with the Advisory Council on Historic Preservation, prepare procedures "to assure that Federal plans and programs contribute to the preservation and enhancement of non-federally owned sites, structures, and objects of historical, architectural or archaeological significance." HUD did not adopt any regulations pursuant to Exec. Order No. 11,593; rather it incorporated by reference the regulations adopted by the Advisory Council. 36 C.F.R. 800.1 *et seq.* Recently, however, HUD amended its regulations to allow for the promulgation of its own historic preservation regulations. 44 Fed. Reg. 12856 (1979). Those regulations have not yet been promulgated.

Such an environmental assessment was undertaken in 1976. Based on the information HUD received from petitioner and others, HUD determined, on January 28, 1977, that the project could proceed without the preparation of a formal environmental impact statement. HUD also determined that, because no properties in the project area were listed or nominated for listing on the National Register of Historic Places, there was no need to consult with the Advisory Council on Historic Preservation. HUD did not examine whether any of the properties in the project area might be "eligible" for inclusion on the National Register (Pet. App. 10a-11a).[5]

On April 21, 1977, HUD was informed by petitioner that a certain carriage house in the Waterbury renewal district might be eligible for listing on the National Register. In response to a request by HUD, the Keeper of the National Register determined on February 7, 1978, that the house was eligible. In December 1977, respondent Waterbury Action to Conserve Our Heritage (WATCH) demanded that

[5] Prior to 1976, the NHPA required that federal agencies consult with the Advisory Council and consider historic preservation only when the undertaking involved property listed on the National Register of Historic Places. In 1976, the NHPA was amended to require that the same procedure be followed when the undertaking involved property "eligible" for listing on the National Register. Act of September 28, 1976, Pub. L. No. 94-422, 90 Stat. 1320. Since 1974, however, the Advisory Council on Historic Preservation regulations, and thus by reference HUD regulations, do require agencies to consider properties eligible for listing since 1974. 36 C.F.R. 800.1 *et seq.*

HUD make eligibility determinations with respect to all of the commercial properties in the project area.[6] HUD then ordered a "freeze" on all federally assisted demolitions until it could complete an eligibility review. Before completing the review, however, HUD lifted the "freeze" on August 31, 1978,[7] whereupon petitioner proceeded to make arrangements to demolish the remaining 27 buildings slated for demolition under the urban renewal plan (Pet. App. 11a-12a).

Respondent WATCH brought suit in October 1978, and on December 22, 1978, the district court granted a preliminary injunction (Pet. App. 12a). The court held that NHPA was inapplicable (Pet. App. 13a-14a), but that NEPA required HUD to reconsider its decision not to prepare an environmental impact statement in light of new information that several buildings in the project area were potentially eligible for inclusion on the National Register (Pet. App. 16a-17a). The court held that the decision point triggering the NHPA had passed at the funding approval stage in 1973 when the loan and grant contract was signed, but that HUD had an ongoing obligation under NEPA to review environmental consequences, including impact on historic buildings, for as long as HUD retained the discretionary authority to

[6] Similar requests were subsequently made by the Connecticut State Historic Preservation Office and the Advisory Council on Historic Preservation.

[7] The freeze was instituted unilaterally by the HUD Area Office and was lifted pursuant to a recommendation from HUD Headquarters.

object to petitioner's acquisition and demolition decisions, which the court found to be major federal actions within the meaning of 42 U.S.C. 4332.

Petitioner and respondent WATCH both appealed,[8] and the court of appeals affirmed the district court's decision with regard to NEPA, but reversed with regard to NHPA. The court of appeals concluded that HUD must comply with both NEPA and NHPA for so long as HUD retains a right to object to acquisitions and demolitions under Section 108 of the loan and grant contract (Pet. App. 35a). The court held that NHPA did not establish that the initial funding approval date serves as a cutoff date for further historic preservation review in cases where such right to object is retained by HUD (Pet. App. 34a).

The court directed that a permanent injunction be entered enjoining HUD and petitioner from demolishing any buildings until compliance with the requirements of NEPA and NHPA (Pet. App. 36a).

ARGUMENT

Petitioner contends that the court of appeals' failure to treat the date of approval of the loan and grant contract as a cutoff date for NHPA obligations is erroneous and in conflict with decisions in other courts of appeals.

1. Although there is contrary authority, the present case is not in direct conflict with any other court

[8] By stipulation the parties agreed to treat the hearing on the preliminary injunction as a hearing on the merits.

of appeals decision. In *South Hill Neighborhood Ass'n* v. *Romney*, 421 F.2d 454 (6th Cir. 1969), cert. denied, 397 U.S. 1025 (1970), the court of appeals affirmed per curiam the district court's decision that plaintiffs lacked standing. The opinion of the district court, including the dictum that the plaintiffs' claim would have failed even if they had standing because NHPA obligations were cut off after approval of the loan and grant contract, was printed as an appendix to the opinion of the court of appeals. In *Hart* v. *Denver Urban Renewal Authority*, 551 F.2d 1178, 1180 (10th Cir. 1977), the court found that NHPA was not violated because the loan and grant contract had been entered into before the building in question was placed on the National Register. This conclusion was dictum, however, because the court upheld the district court's injunction on the ground that NEPA required HUD to consider the historical significance of the building in accordance with its regulations. Moreover, as the court below pointed out (Pet. App. 14a n.8, 34a), the court in *Hart* did not focus on whether a right was retained to object to expenditures of funds subsequent to approval of the loan and grant contract, as it did here.

2. Moreover, a resolution of the issue presented by petitioner would be of limited significance in this case and might not be of substantial future importance.

When HUD's obligation under NHPA in this case arose in 1973, the statute required consideration only of properties listed on or nominated to the National

Register. In 1976, the statute was amended to also require consideration of properties "eligible" for listing on the National Register. Thus, in the future, consideration of all eligible properties at the time of entering into a loan and grant contract will likely obviate the occasion for reconsideration at later stages of a project.

In addition, resolution in petitioner's favor of the question presented would not result in a dissolution of the injunction. Both the district court and the court of appeals held that HUD did not fulfill its obligation under NEPA to consider the effect of the demolition on eligible properties. Petitioner does not challenge this holding. Thus, the injunction is supportable on a basis quite independent of the interpretation of NHPA that petitioner challenges.

Finally, HUD acknowledged in the district court that it had not adhered to the instruction in its Environmental Handbook to consider "eligible" properties and to consult with the Advisory Council before their demolition. Thus, apart from the possible effect of the 1976 statutory amendment, HUD was required to consider eligible properties in this case. See, *e.g.*, *Hart*, *supra*, 551 F.2d at 1182.[9] HUD is in the process of writing its own regulations concerning historic

[9] The court of appeals did not reach the question of the applicability of HUD's Environmental Handbook instruction. The district court found that the instruction, effective in 1974, was not applicable because the loan and grant contract was entered into in 1973 although the preservation review did not take place until 1976 (Pet. App. 11b).

preservation review, which may eliminate problems of the kind that arose in this case. Moreover, HUD is revising its outstanding loan and grant contracts to eliminate the provision that presently authorizes the Department to later object to specific actions of the grant recipients already approved in the contract.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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